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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 991

TERRY INDUSTRIES OF VIRGINIA, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TERRY INDUSTRIES OF VIRGINIA, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Terry Industries of Virginia, Inc., petitions for a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Fourth Circuit entered on December 9, 1968.

OPINIONS BELOW

The decision of the Court of Appeals (App. A, *infra*, pp. 1a-3a) is not yet officially reported and is unofficially reported at 69 LRRM 2678.[1] The decision and order of the National Labor Relations Board (App. C, *infra*, pp. 5a-6a), 164 NLRB No. 117, 65 LRRM 1247, is not yet officially reported.

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[1] The decision of the Court of Appeals is printed in Appendix A hereto, that of the Board in Appendix C, and of the trial examiner in Appendix D. References to numbers followed by "a" are to the Appendix hereto; references to "J.A." are to evidence contained in the Joint Appendix.

JURISDICTION

The judgment and decree of the Court of Appeals were entered on December 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals has misapplied the standard of judicial review established in *Universal Camera Corp.* v. *NLRB,* by failing to consider, in a case involving alleged discriminatory discharges, those portions of the record which demonstrate the employer's lack of hostility to the union's organizing drive and its supporters.

2. Whether the findings of the National Labor Relations Board that two employees were discriminatorily discharged in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, are supported by substantial evidence on the record considered as a whole.

STATUTES INVOLVED

The following provisions of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* —, are involved:

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations,

to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . .

Sec. 10(e). The Board shall have power to petition any Court of Appeals of the United States, . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . .

STATEMENT OF THE CASE

A. Nature of the Proceedings

This case involves an order by the National Labor Relations Board, enforced by the United States Court of Appeals for the Fourth Circuit, which holds that two employees—Cather Orndorff and Dwight Funkhouser—were discriminatorily discharged in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, and requires their reinstatement with back pay.[2]

B. The Facts of the Case

Terry Industries of Virginia, Inc. (herein called the Company) began its manufacture of camping trailers at Winchester, Virginia, in January 1966. It started

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[2] The Board also found that the Company had unlawfully created the impression of engaging in surveillance in violation of Section 8(a)(1). That portion of the order, also enforced by the court, is not involved here.

with one or two employees and eventually increased its work force to approximately 50 employees. The only supervisory personnel in the plant were the plant manager, the production manager, Allan Rusk, and the assistant to the production manager. The work in each of the various departments in the plant is under the direction of a leadman, who is the link between the production manager and the employees.

Union organizing activity began in July, 1966, and culminated in a representation election on September 8. The two discharges in question occurred in August, 1966, Cather Orndorff being discharged on August 18, and Dwight Funkhouser on August 23 (8a).

It was conceded by the Board in its brief to the court below (Br. p. 8) that "the record here fails to disclose anti-union conduct apart from the discharges themselves". That concession, correct as far as it went, actually understated the evidence in the record, for it was undisputed that on August 10—a week before the first of the contested discharges—the Company promoted a known union leader, Robert Quick, to a top position (that of leadman) in the plant (15a). Moreover, at the time of Funkhouser's discharge on August 23, a known anti-union employee, Herbert Bowen, who was involved with Funkhouser in the incident giving rise to the discharge, was also discharged.[3]

The discharge of Orndorff, who was characterized by the trial examiner as playing a "leading role . . .

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[3] The attitudes toward the union of both Quick and Bowen became known to the Company when the two, sometime in July, became involved in a heated argument over the union in the plant (15a). Quick threatened to "tar and feather" Bowen if he didn't vote for the union, and Bowen threatened to "blow Quick's head off". This altercation was reported immediately thereafter to Allan Rusk, the production manager (15a).

along with Funkhouser and Quick, in furthering the Union's organization effort" (12a),[4] was for violation of a published regulation of the Company, known as the 24-hour rule (10a; J.A. 92). Under this rule, employees who have missed an entire day of work and the first two hours of the next work day, without calling in an excuse, are terminated. The dismissal becomes effective at approximately 9:00 A.M. of the second day (10a), the time that Production Manager Rusk returns from the production floor to his office and inspects the time cards.

It was uncontroverted that Orndorff did not notify the Company of his absence as required under the 24-hour rule. On Wednesday, August 17, when Orndorff did not report to work, Rusk sought out Funkhouser, Orndorff's next door neighbor, and asked if he knew why Orndorff was not at work (9a; J.A. 50, 100). Funkhouser, who in fact did not know why Orndorff was absent, was not able to give Rusk any reason (4a).

The next day Orndorff again failed to report to work. The Board conceded that Orndorff sent no word to the Company by 9:00 A.M. (J.A. 101). At that time Rusk made out Orndorff's time card, jotted on the back of the card "terminated—company policy—did not call in—this is not the first time" (10a; J.A. 156), and instructed the accountant to draw Orndorff's termination check (J.A. 101).

Not until 11:30 A.M. of the second day did the Company receive any message on behalf of Orndorff (9a;

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[4] Although the Company conceded that it was aware of the role of Funkhouser and Quick, it denied any awareness of Orndorff's participation in the union campaign. The trial examiner, however, did not credit Rusk's testimony in this regard (12a).

J.A. 101). At that hour a receptionist in a dentist's office telephoned the Company and notified it that Orndorff was at that office and that he "would be out to talk to them" (9a). At about 1:00 P.M., Orndorff appeared at the plant, where he was handed his termination check and told by Rusk that he was discharged for not calling in on two successive days (9a; J.A. 44).

The 24-hour rule with its penalty of discharge had been invoked in a number of instances prior to the discharge of Orndorff on August 18, (10a) the most recent being the discharge of employee Delmar Feathers less than two weeks before (J.A. 140, 148). Three other employees—Herbert Hughes on June 17 (J.A. 142, 151), Samuel Mills on May 24 (J.A. 144, 154), and Leslie Yost on June 6 (J.A. 147, 159)—likewise were discharged on the second day in adherence to the rule. The rule was also applied to Clarence Swartz (J.A. 146, 158) and Edgar Luttrell (J.A. 143, 153) on April 30, although they received one day's grace—they were not fired until the third day—because of an intervening local holiday, the Winchester Apple Blossom Festival (J.A. 96); and to Derek Heishman who was terminated on April 22 (J.A. 141, 150). In only one case, involving a janitor named William Walker (11a), did an individual violate the rule without being discharged.

The other dischargee involved in this case, Dwight Funkhouser, was discharged for disobeying Production Manager Rusk's instruction against sawing out "whatnots", decorative items such as half-moons, stairs or stars cut out by employees for their personal use (18a, J.A. 87). As the trial examiner noted, on several occasions Rusk had warned employees, including Funkhouser, against the cutting of such pieces (16a). The first warning was given in March 1966, when Rusk

learned that Bowen had cut out a whatnot and ordered him not to repeat it (16a; J.A. 80). At that time, as the trial examiner found (16a), Rusk called together all the employees in the mill department—the department in which the saws were located—and told them that he wanted that practice stopped (J.A. 81).

In June Funkhouser was made leadman over the mill department (16a). In late July an employee reported to Rusk that she had been asked by a fellow employee to paint some whatnots (16a). After searching the plant for whatnots without success, Rusk told Funkhouser—in testimony credited by the trial examiner—that whatnots were being cut out again and warned that "he or no one else was supposed to do that cutting" (16a; J.A. 81, 127). Rusk reminded Funkhouser of this warning again in early August (20a).

The matter came to a head at the close of the shift on August 22. Herbert Bowen was spotted by Stanley Haines, Rusk's assistant, as he approached the time clock carrying a large carton which contained a whatnot with sawed half-moons concealed under some paper sacks. Haines stopped Bowen, ascertained that a whatnot was in the carton, and took the carton and its contents away from Bowen (18a; J.A. 70).

Rusk learned of this incident from Haines after the close of the shift, and at the beginning of the next day's shift called both Bowen and Funkhouser into his office (18a). He included Funkhouser "because if the material was cut, it had to be cut in there, and he was warned not to let that stuff be cut either by him or anyone else" (J.A. 128). Funkhouser told Rusk that he had picked the whatnot up from the floor and admitted that he had sawed a portion of it (18a; J.A. 87).

Rusk then reminded Funkhouser and Bowen that they had been warned against the cutting of whatnots and discharged both of them (18a; J.A. 87).

Rusk in their presence then made up their time cards, and shortly thereafter handed them their final paychecks (J.A. 87). Rusk then made notations on their respective application blanks on the line headed "Reason for termination." On Bowen's application (19a), he noted "making whatnots on company time" and amplified this in the "remarks" column by noting the prior warning. On Funkhouser's application (19a) he wrote "did not do job as to instructions, sawing whatnots on company time."

The discharges of Orndorff and Funkhouser were in keeping with the practice of the Company, which had never had an intermediate penalty between oral warning and discharge and had never issued written warnings or suspensions. The penalty of discharge had been frequently imposed, for in the Company's first nine months of operation, 28 employees—its average complement of employees was 50—had been discharged (J.A. 76, 77).

C. The Decisions Below

The Board adopted the trial examiner's decision *in toto*. The trial examiner recognized that in this case, unlike the ordinary case, the General Counsel could point to no anti-union conduct apart from the discharges as support for an inference of discrimination (14a). He relegated to a footnote, however, the Company's promotion of Union leader Quick, stating "As to Quick, it suffices to note that the Company may well have had no pretext for treating him in any other fashion . . ." (21a, n. 13). Concerning the firing of the anti-

union Bowen, the trial examiner stated in the same footnote that "he had to be discharged to preserve even the semblance of a pretext for discharging the union leader, Funkhouser."

With respect to Orndorff, the trial examiner concluded that the Company, contrary to its assertions, was aware that Orndorff was a union leader, and had discharged him because of his union activity. Although acknowledging that Orndorff had violated the 24-hour rule, he rested his finding of illegal discharge on the asserted grounds that the action of the employer was unnaturally harsh, the 24-hour rule had been relaxed in other cases, and notations made by the Company on Orndorff's personnel folder exaggerated the evidence against him (13a).

With respect to Funkhouser, the trial examiner observed (20a) that "If Funkhouser's case stood alone, I would incline to the view that General Counsel had established nothing more than suspicious circumstances, and would not have carried his burden of proof". He found that Funkhouser had previously been warned against the sawing of whatnots (16a, 20a). Nevertheless, he concluded that his finding that Orndorff had been fired for union activity "tips the balance" in Funkhouser's favor, and concluded that the discharge of Funkhouser was likewise unlawful (21a).

The Court of Appeals in an eight paragraph opinion enforced the Board's order. It acknowledged that "the case may be debatable" (3a). Focusing, however, on the immediate facts of the discharges, it noted that the 24-hour rule enforced in Orndorff's case had "not been inflexibly enforced on prior occasions", that although Funkhouser had received a prior warning, "his mis-

conduct on this occasion was minimal", and that the Company had "attempted to build a defense" by adding questionable data to the personnel records of the two men. The court also stated that the testimony of Production Manager Rusk was "crucial evidence" on the question of employer motivation and referred to the discrediting by the trial examiner of some of his testimony.[5]

The opinion of the court, however, made no mention of the portions of the record showing the employer's lack of hostility to the union, and did not advert to either the promotion of Quick or the discharge of Bowen. Accordingly, it offered no evaluation of the importance of those aspects of the record to the discharges in issue, and thus failed to make a judgment based upon the substantiality of the evidence on the record considered as a whole.

REASONS FOR GRANTING THE WRIT

The case at bar is one in which the standard of judicial review enunciated in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, "appears to have been misapprehended or grossly misapplied", and hence calls for intervention by this Court. Despite the pronouncement by this Court in *Universal Camera,* 340 U.S. at 488, that "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight," the opinion of the court below fails to take

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[5] Rusk's testimony was "crucial" only in the sense that if his testimony as to the reasons for discharge were not believed, it would be necessary to turn to other evidence in the record. The case does not turn on credibility findings, for on all critical facts Rusk was either credited by the trial examiner or corroborated by other witnesses.

into account uncontradicted evidence in the record which demonstrates the complete absence of any antagonism on the part of the employer to the union or its adherents.[6] The need for canvassing the whole record can be seen in sharper relief than usual in this litigation, in that (a) the Board itself conceded "Unlike the usual Section 8(a)(3) case, the record here fails to disclose anti-union conduct apart from the discharges themselves," and (b) it was uncontroverted that at about the time the two discharges occurred, a known and outspoken union adherent was given an important promotion. For the court below to have ignored without comment these features of the case, while concentrating exclusively on evidence relating to the discharges themselves, indicates far too narrow a conception of its reviewing obligation under the standard set forth in *Universal Camera.*

Enforcement of the Board's order was the result of the Court's belief that the circumstances immediately surrounding the discharges were suspicious enough to justify the Board's evaluation that the discharges were discriminatory. Its brief recitation of the evidence was limited to that point alone, a limitation consistent with its stated rationale of being bound by Board findings which are "supported by circumstances from which the conclusion of discriminatory discharge may legitimately be drawn" (3a). Where the court's inquiry failed to extend to the evidence underlying the contention of the employer that he bore no animosity toward

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[6] This Court went on to say that "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

the union or its supporters [7]—where the promotion of a union leader and discharge of an anti-union employee proved the employer's refusal to regard the union attitudes of its employees as a relevant factor in extending benefits or imposing penalties—the Court's examination fell far short of ascertaining whether there was substantial evidence on the record *considered as a whole.*

Indeed, the Court's approach in this case constitutes a distressing retreat to the pre-Taft-Hartley standard of review, which gave "the Board great latitude in choosing the evidence that it will believe and gives great effect to findings that rest on *that* evidence" (emphasis supplied). H. Rept. No. 245 H.R. 3020 (1947), I Legis. Hist. 331. In light of the acknowledgment of the court below that "The case may be debatable", there is a strong probability that the outcome would have been different had the Court applied the proper standard for review.

This case places in sharp focus the question of the reviewing obligation of the court of appeals, for a substantial bloc of evidence adverse to the Board's findings was not discussed, or as far as the court's opinion reveals, weighed by the court. The issue is plainly one of significance in the administration of the Act, for cases involving unfair labor practice charges against employers—which, with but few exceptions, turn on

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[7] In failing to consider such evidence, the court below has implicitly rejected the pronouncements of other courts of appeals that the lack of an anti-union background tends to negate suspicions that asserted grounds for discharge are fictitious and that discharges are unlawfully motivated. *NLRB* v. *Western Bank and Office Supply Co.*, 283 F. 2d 603 (CA 10, 1960); *NLRB* v. *Isis Plumbing & Heating Co.*, 322 F. 2d 913, 922 (CA 9, 1963).

the question of employer motivation—are constantly brought before the courts of appeals on petitions for enforcement or review.

In the almost two decades which have elapsed since this Court issued its decision in *Universal Camera,* it would not be surprising that the various courts of appeals have adopted, in language or in practice, different and conflicting versions of the substantial evidence requirement. See *NLRB* v. *Walton Mfg. Co.,* 369 U.S. 404 (1962). The continuing need to examine the whole record should be reaffirmed by this Court. It would be tragic from the standpoint of proper judicial review if reviewing courts were to slip into an undue dependence on Labor Board findings through the failure to consider the body of evidence opposed to the Board's view as well as that which tends to support it. The statutory arrangement for judicial review, to be sure, does not permit a court of appeals to substitute its judgment for that of the Board where substantial evidence on the record *considered as a whole* supports the Board's view. However, the statute commands no less than that the court reach its decision on the basis of the whole record rather than merely those portions upon which the Board relies.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January, 1969

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,153

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

versus

TERRY INDUSTRIES OF VIRGINIA, INC., *Respondent.*

On Petition for Enforcement of an Order of the National Labor Relations Board.

(Argued November 1, 1968 Decided November 15, 1968)

Before SOBELOFF, WINTER and BUTZNER, Circuit Judges.

Paul J. Spielberg, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Edith E. Nash, Attorney, National Labor Relations Board, on brief) for Petitioner, and Lawrence T. Zimmerman (Reilly, Johns & Zimmerman; Hugh J. Scallon, and Gibson, Dunn and Crutcher on brief) for Respondent.

Decision

SOBELOFF, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order directing Terry Industries of Virginia, Incorporated, to cease and desist from unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act, to offer reinstatement to two employees illegally discharged, and to post a notice negating the impression of surveillance created by company actions. Finding substantial evidence in the record as a whole to support the

Board's findings, we enforce its order. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

Terry Industries began producing camping trailers at Winchester, Virginia, in January, 1966, and in July of that year, union organizing activity began in the plant. Cather Orndorff and Dwight Funkhouser, the employees whose discharges were found by the Board to have been discriminatorily motivated, were both involved in the organization drive. A representation hearing was held on August 10, 1966, and an election followed on September 8.

On August 18, before the election, Orndorff was discharged, ostensibly for a twenty-four hour absence from work. On August 23, the company discharged Funkhouser, for the stated reason that he and another employee, whose discharge is not questioned, had unauthorizedly used company saws for personal purposes.

The plant production manager, Rusk, who discharged both employees, testified at the hearing that he was merely following established company policy in discharging the men. The twenty-four hour rule enforced against Orndorff, however, had not been inflexibly enforced on prior occasions. Although Funkhouser had once before been warned about a misuse of the saws, his misconduct on this occasion was minimal. There was also evidence that the company attempted to build a defense by adding to the personnel records of the two men data supplying legitimate reasons for their discharge. In the case of Funkhouser, it appears that this was done at a later date at the instance of a California representative of the company.

The testimony of Rusk was crucial evidence on the question of employer motivation and his credibility was in issue. The hearing examiner specifically found Rusk's testimony to be false in one respect, and therefore he did not credit his testimony concerning the company's motives for the discharges. The Board adopted the examiner's report and findings.

Following the legally accepted standard, this court has recently stated:

> [W]hen the circumstances surrounding the dismissal cast doubt on the employer's motivation, neither the Board nor the trial examiner is bound to accept his explanation. They are empowered to conduct their own inquiry and when their findings are " 'supported by circumstances from which the conclusion of discriminatory discharge may legitimately be drawn,' it is binding on the court, and we are without power to substitute our judgment for that of the Board." *NLRB* v. *Lifetime Door Company,* 390 F. 2d 272, 275 (1968).

The case may be debatable, but since there is substantial evidence for the Board's conclusion that the discharges were discriminatory, we enforce its order to reinstate the two employees with back pay.

The Board also found that the company had created an impression of surveillance by indicating that it knew who had and who had not attended a union meeting. Such conduct violates section 8(a)(1). NLRB v. Ralph Printing and Lithographing Co., 379 F. 2d 687, 691 (8th Cir. 1967). There is likewise substantial evidence to support this finding and the Board's order is enforced in its entirety.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,153

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

TERRY INDUSTRIES OF VIRGINIA, INC., *Respondent.*

On Petition for Enforcement of an Order of the National Labor Relations Board.

Decree

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Terry Industries of Virginia, Inc., Winchester, Virginia, its officers, agents, successors, and assigns on the 22nd day of May, 1967, in a proceeding before said Board known upon its records as Cases Nos. 5-CA-3604 and 5-RC-5677; upon the answer of said Respondent, and upon the certified list in lieu of a transcript of record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and the same is hereby, enforced, and that the said Terry Industries of Virginia, Inc., Winchester, Virginia, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

s/ SAMUEL W. PHILLIPS
Clerk

December 9, 1968

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 5-CA-3604, 5-RC-5677

TERRY INDUSTRIES OF VIRGINIA, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO

Decision, Order, and Direction

On February 9, 1967, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also recommended that the Board overrule the challenges to the ballots of Cather Orndorff and Dwight Funkhouser, and that the Regional Director be directed to open and count their ballots and take such further action in the representation case as may be appropriate. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The Charging Party filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The

Board has considered the entire record in this case, including the Trial Examiner's Decision and the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Terry Industries of Virginia, Inc., Winchester, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

DIRECTION

IT IS HEREBY DIRECTED that the Regional Director for Region 5 shall, pursuant to the Rules and Regulations of the National Labor Relations Board, within 10 days from the date of this direction, open and count the ballots of Cather Orndorff and Dwight Funkhouser, and thereafter prepare and cause to be served upon the parties a revised tally of ballots, including therein the count of said ballots, and issue the appropriate certification.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
SAM ZAGORIA, *Member*
National Labor Relations Board

(SEAL)

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[1] We hereby correct the following error in the Trial Examiner's Decision: the charges herein were filed on September *14*, 1966, and not on September *19*, 1966.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases Nos. 5-CA-3604, 5-RC-5677

TERRY INDUSTRIES OF VIRGINIA, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO

Trial Examiner's Decision

These cases, consolidated by order of the Acting Regional Director, and heard at Winchester, Virginia, on November 30 and December 1, 1966,[1] present primarily questions as to whether Respondent (herein called the Company) discharged two employees for legitimate cause or for activity on behalf of the Charging Party (herein called the Union). These questions, of self-evident importance in the unfair labor practice case, must also be resolved in the representation case, in which a Board election, held September 8, 1966, resulted in a 24 to 24 tie with 2 challenged ballots[2] cast by the men whose status as eligible voters turns on whether their discharges shortly before the election were lawful. Upon the entire record, and after due considera-

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[1] The charge was filed September 19, 1966, and complaint issued October 21, 1966. All dates herein, except the date of this Decision, refer to the year 1966.

[2] Originally three challenged ballots, but one challenge was dropped.

tion of the briefs filed by each of the parties, I make the following:

Findings of Fact

I. The Business of the Company and the Labor Organization Involved

The pleadings establish, and I find, that the Company, a Virginia corporation, engaged at Winchester in the production and sale of camping trailers, annually ships products valued in excess of $50,000 to points outside the State and is engaged in commerce within the meaning of Section 2(6) of the Act. The pleadings further establish, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Background—The Organizing Campaign*

The Company commenced operations in February 1966. About May 1 the Union commenced efforts to organize the plant. The first union cards were signed July 9; the signers were Dwight Funkhouser and Cather Orndorff, whose later discharges form the principal subject of this case. Funkhouser, Orndorff, and a third employee, Robert Quick, led the organizing drive, with Funkhouser as the prime mover. In due course the Union filed a representation petition, and at the ensuing Board hearing on August 10 Funkhouser sat at counsel table with the Union's lawyer and its International representative. As noted above, the representation proceeding led to an election on September 8, but Orndorff and Funkhouser had been discharged on August 18 and 23, respectively, under circumstances described below.

B. *The Discharge of Orndorff*

On the morning of August 17, Orndorff was suffering from an infected jaw and was unable to go to work. He had no telephone, but he sent word to his neighbor, Funk-

houser, to notify the Company that he (Orndorff) would not be in to work that day. This was a practice which Orndorff had previously followed in his 6 months' employment with the Company on occasions when he was not coming to work. On this occasion, contrary to his past practice, Funkhouser, on arriving at work in time for the 7 a.m. starting hour did not immediately report Orndorff's absence to the office. Not until later in the morning, when Production Manager Allan Rusk asked Funkhouser where Orndorff was, did Funkhouser advise the Company that Orndorff was not coming in. According to Funkhouser, Rusk did not ask and Funkhouser did not offer any reason for Orndorff's absence; according to Rusk, he asked the reason, and Funkhouser said he knew of none. I am inclined to credit Rusk on this issue, as the question seems to me a natural one to ask, and Funkhouser himself testified that at that time he did not know the reason for Orndorff's absence. Funkhouser placed the time of Rusk's inquiry as 8:30 to 9 a.m.; Rusk placed it as "late morning," and after 9 a.m. Again I credit Rusk as more apt to have been aware of the hour.

That evening Funkhouser called on Orndorff, who said that if his infection did not subside he would go to the dentist the next day, August 18. He did not, however, ask Funkhouser to tell the Company that he (Orndorff) would not be in the next day. The next morning between 10 and 11 a.m., Orndorff went to the dentist, and about noon the latter's secretary telephoned the plant at Orndorff's request to advise the Company that Orndorff was undergoing medical treatment and would be at the plant later in the day.

Orndorff arrived at the plant about 1 p.m., and advised Plant Manager Leroy Armstrong that he had just been to the doctor, would have to go back for further treatment in about 10 days, and would not be at work that afternoon. Armstrong sent for Production Manager Rusk, who handed Orndorff his final paycheck and told him he was discharged for not reporting in.

Rusk testified that he had made out Orndorff's final paycheck earlier that day after noting that Orndorff had not reported in. This, according to Rusk, was his regular policy in cases in which an employee who was absent 1 day without notifying the Company did not report by 9 a.m. of the following day. This policy in turn stems from a formal company rule, which reads as follows:

> If, however, you know you will be late or absent please notify your production manager immediately. You must do this within two hours after you are supposed to be here so that arrangements can be made to have your work done. If we do not hear from you within 24 hours it is necessary for us to remove your name from the payroll.

According to Rusk, this rule had been invoked in seven other cases in addition to Orndorff's. The seven cases involved employees Feathers, Heishman, Hughes, Luttrell, Mills, Swartz, and Yost. In contrast to Orndorff, who had been with the Company for 6 months, the actual worktime of the other seven could be reckoned in terms of days.[3] Moreover, of these seven, the records of Luttrell and Swartz show that they were each allowed a third consecutive day of unreported absence before being discharged, a circumstance which the Company explains as leniency accorded them because they were new employees and their first days of absence coincided with the local Apple Blossom Festival. Also Heishman appears to have been absent 3 consecutive days before being discharged.

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[3] Feathers 1 day, Heishman 6, Hughes (who had quit once before) 29, Luttrell 3, Mills 17, Swartz 2, and Yost 7. These figures, of course, exclude weekends and days absent. In this connection, it should be noted that the rates of pay and the dates therefor on the employment record are apparently entered in advance when the employee is hired and reflect his potential future changes in rate, as in many cases the dates shown in those columns go far beyond the date of termination. The actual duration of employment is shown by the "date started" and "date terminated" on each record.

General Counsel, in addition to the Luttrell, Swartz, and Heishman examples introduced by the Company, showed two other instances in which the rule invoked in Orndorff's case was not applied. In one case, one Kuykendall had 3 consecutive days of absence in 1 week and was not discharged until the next. The Company explained this as having occurred during a heavy snowstorm; Kuykendall (like Orndorff) had no telephone, and the Company assumed he had been snowbound. The other case was that of a janitor, Walker, on whose timecard the Company wrote "did not call" on 3 consecutive days, but thereafter erased the entries on the last 2 days upon receiving word on or after the third day that he had been sick. In sum, of the nine cases in addition to Orndorff's in which the absence rule might have been invoked as speedily as it allegedly was in his case, the Company waived the rule twice because of a late report of illness, and once for no reason shown on the record.

Analysis of the employment records discloses one difference of treatment in Orndorff's case which may be significant. In all the cases proffered by the Company of discharges for unreported absences the timecards showed a notation as to the reason for discharge, and a notation also appears at the top of the employment record after "Reason for Termination." These employment record forms, however, also contain a column headed "Remarks." This column is blank on all the other "absentee" discharges, but is filled in on Orndorff's as follows: "Whenever this man is off, he never calls in. He has been doing this since employment." Production Manager Rusk testified that he filled that column in when Orndorff was discharged, and the record does not disclose why the column was left blank with respect to all the other "absentee" discharges. The evidence, I might add, falls far short of sustaining the "Remarks" on Orndorff. The Company identified only 2 other days on which he was absent in the course of his 6 months, and he sent timely word on one of those (on the other, his

car broke down, apparently while he was en route to work). Orndorff also was absent some other times, unidentified as to dates, but Rusk's own testimony is that Orndorff on other occasions when he was not coming to work had sent in word to the Company via Funkhouser.[4]

Rusk's testimony is suspect in certain other respects as well. He testified that he noticed no swelling on Orndorff's jaw and face on August 18, a statement I find difficult to credit. Orndorff had just come from the doctor's and had an appointment to return there about 10 days later. He had been suffering considerable pain for 2 days; his face was still swollen later that evening when Funkhouser saw him at home. Moreover, Rusk knew Orndorff had been at the doctor's that morning. More important, I do not credit Rusk's testimony that he did not know or even suspect that Orndorff was active in the Union or a union member. Rusk himself later admitted saying to Orndorff on one occasion, "I heard that you were up to the Union Hall last night." Also the testimony is undisputed that Stanley Haines, Rusk's assistant, during the 2 weeks preceding Orndorff's discharge, repeatedly asked Orndorff if he "was going down to the Union Hall." Finally, Rusk knew that Funkhouser was the union leader, and that Funkhouser and Orndorff were closely associated away from the plant. On considering the whole record I am compelled to brand as unworthy of belief Rusk's testimony that he did not even suspect Orndorff might be a union member, and this falsehood casts doubt on his answers to related questions concerning his knowledge of the leading role Orndorff played, along with Funkhouser and Quick, in furthering the Union's organizing effort.

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[4] The Company, although producing timecards showing unexcused absences for a number of employees, produced only one such card for Orndorff, covering his last week of employment. The failure to produce any documentation for his other alleged unreported absences warrants an inference that such proof does not exist. See *N.L.R.B.* v. *Kalof Pulp & Paper Corporation*, 290 F. 2d 447, 451 (C.A. 9); *N.L.R.B.* v. *Elias Brothers Big Boy, Inc.*, 327 F. 2d 421, 427 (C.A. 6); Note, 5 ALR 2d 893, 896, 907-908, 909-911.

In addition to such light as may be shed on the matter by the false testimony of Rusk, I note further the peculiar fact that Rusk at the time of discharge made a detailed (and what is more, a false or inaccurate) statement in the "Remarks" column of Orndorff's employment record setting forth the assigned reason for discharge, a practice not followed with respect to any other employee allegedly discharged for failure to report his absence. Also, the rule allegedly invoked in this case had not been rigidly applied, but had been waived where the failure to report could be attributed to a local festival, a snowstorm, illness (reported as in Orndorff's case after the permitted time had expired), or (in Heishman's case) for no apparent reason at all. Orndorff was one of the oldest company employees in length of service and was considered a satisfactory workman,[5] a factor of some significance in view of Rusk's testimony that the regular complement of employees had been about 50, that he had been trying to keep close to 60, and that "sometimes it's real rough" to obtain replacements.

In short, considering all the facts, I do not believe that the Company fired Orndorff for the reason assigned. Under any circumstances it would strain credulity to the breaking point to find that an employer discharged a man who had been undergoing medical treatment and who was 2 hours late in apprising the employer of this fact; even if discharge papers had been prepared, the natural reaction of any person in these circumstances would be to tear them up. Cf. *E. Anthony & Sons, Inc.* v. *N.L.R.B.*, 163 F.2d 22, 26 (C.A.D.C.): "Such action on the part of an employer is not natural" But when to this is added the special notation made in the "Remarks" column, the inaccuracy (to put it mildly) of the report there made, the fact that the rule allegedly invoked had been relaxed in other cases, the

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[5] There is some suggestion that his work in the cabinet shop to which he had recently been transferred was not up to standard but the Company expressly stated on the record that his discharge "was not related to his cabinet work" and that it rested exclusively on the nonreporting of absences.

false testimony before me as to the nonexistence of even a suspicion of Orndorff's union leanings, the need for and difficulty in obtaining employees—upon all these facts, I am compelled to find that the Company gave a false reason for its discharge of Orndorff, and compounded the falsity by careful preparation of a false statement in the "Remarks" and by false testimony before me. I must perforce conclude that the Company is striving to conceal its true motive, and that that motive is unlawful. See *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9).

It is clear, of course, that Orndorff's union activity furnished him no guarantee against discharge, and it is equally clear that an employee may lawfully be discharged for a "bad" reason (other than statutorily protected activity) or for no reason at all, and that the Board may not substitute its business judgment or its standards of reasonableness for that of the employer. The law is also clear that the burden of proof of showing a violation is on the General Counsel. The question is whether application of these principles leads to dismissal of Orndorff's case, notwithstanding that the reason assigned for discharge "does not stand up under scrutiny." *North Carolina Finishing Company* v. *N.L.R.B.*, 133 F.2d 714, 718 (C.A. 4); see also *N.L.R.B.* v. *Thomas Dant, et al. d/b/a Dant & Russell, Ltd.*, 207 F.2d 165, 167 (C.A. 9), and the cases there cited.

In the ordinary case, the General Counsel is able to point to other antiunion conduct of the employer as support for the inference that union activity was the real reason for the discharge which the employer sought to explain on false grounds. In this case, as more fully noted below, I find that apart from the discharges themselves, the Company engaged in little overt antiunion conduct.[6] But just as the showing of other antiunion conduct is of some support, but is not conclusive, in establishing that a particular discharge

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[6] There is some evidence of hostility to the Union in that Rusk on one occasion said to Funkhouser: "Why don't the employees out here pick someone in the plant to represent them instead of the Union?"

was for union activity, so the comparative absence of such conduct is not conclusive in establishing that a discharge was not for union activity. A contrary rule would mean that an employer could discharge union leaders with impunity if he refrained from other acts of hostility to the Union. The ultimate question is what was the reason for the discharge, and the presence or absence of other anti-union actions is an aid to answering the question, not an answer in itself. On this record, the General Counsel must make his case, if he can, without substantial aid of that nature. But I am satisfied that he has made it. I find that the reason given for the discharge was a false one, and I infer from that fact, and from the other surrounding circumstances previously detailed, that the false reason was given and pressed in an effort to conceal an illegal reason—Orndorff's union activity. Cf. *Shattuck Denn Mining Corp., supra.*

C. *The Discharge of Funkhouser*

1. Background—events preceding the episode which culminated in the discharge

As already stated, Funkhouser was the most active union proponent among the employees. On August 9, Funkhouser asked Rusk for permission to be absent on August 10 to attend the hearing in the representation proceeding. Rusk replied, "So you're the one," and added the query, quoted in footnote 6, as to why the employees wanted a union to represent them. He gave Funkhouser permission to attend the hearing, and on August 10 Funkhouser sat at counsel table with the union representative during the hearing. By coincidence, on this same day, August 10, the Company promoted Robert Quick to a leadman's position, although the Company was well aware of Quick's support of the Union. Quick had been embroiled with employee Herbert Bowen earlier in the summer over Bowen's refusal to indicate support of the Union, and Bowen had brought the quarrel and its cause to the attention of management. By further coincidence Bowen was involved in the episode which culminated in the discharge of Funkhouser, as detailed below.

Funkhouser, one of the first employees hired by the Company when it commenced operations in February, became leadman in the mill in June. The mill was the department in which most of the powersaws were located. Some employees (some employed outside the mill department as well as some employed within it) from time to time would use the saws to cut out small wooden decorative objects (referred to as "whatnots") for their personal use. On one occasion, in March, Production Manager Rusk told several employees in the mill that he wanted this practice stopped. In July however, Rusk learned from employee Shelby Bishop that Bowen had asked her to stain some "whatnots" for him. Rusk looked for "whatnots" in the plant at that time, but could not find any and did not discuss the matter with Bowen. According to Rusk, he did discuss the matter with Funkhouser at that time, asked him if he knew anything about it, and—upon receiving Funkhouser's negative reply—emphasized that no one was to cut out "whatnots." Funkhouser's testimony on this matter is somewhat equivocal, and I credit Rusk.

On August 11, the day after the representation hearing, employee Ray Knight complained to Rusk about a verbal altercation Knight had had with Funkhouser. Rusk, according to his testimony, ascertained from Funkhouser that Knight "had been going around the plant popping off because he, Funkhouser, had gone to the [representation] hearing and Knight wanted to know why." Rusk admitted on the witness stand that it was Knight, not Funkhouser, who had been creating the turmoil in the plant. Nevertheless, Rusk after talking to Funkhouser made the following entry on the latter's employment record:

> I have had this man in my office, talked to him about his job. He was told to stay in his own dept. but did not. He was told not to cut out anything for anybody other than company work. He was told not to let anyone use the saws other than those assigned to them.

Rusk testified that the references there made to cutting out work for other people and permitting them to use the saws were not prompted by anything in the Knight altercation, but came out of "the incident that happened a week or so earlier," apparently referring to Bishop's report on staining for Bowen, which Rusk had received the preceding month.[7]

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[7] This is perhaps as good a place as any to note that Rusk was a most unsatisfactory witness. In some aspects, as noted above, I have credited his testimony. But on occasion his evasiveness gave rise to grave doubts as to his fundamental veracity in this hearing. Note, for example, the following exchange on cross-examination of Rusk:

> Q. Did Mr. Funkhouser tell you what this "popping off at him" was all about?
> A. Yes.
> Q. What did he tell you?
> A. He said he was popping off, that Ray Knight was . . . .
> Q. Right.
> A. . . . about him and the Union.
> Q. And going to the hearing, was it not?
> A. He could have.
> Q. Not "He could have." Wasn't that it, that Ray Knight was popping off around the plant because he had gone to the Union to represent the employees?
> TRIAL EXAMINER: "Because he?" Who?
> MR. SLAUGHTER: Mr. Funkhouser.
> TRIAL EXAMINER: All right.
> Q. (By Mr. Slaughter) Wasn't that what he was popping off about?
> A. Probably it was.
> Q. Not "Probably it was." It was, was it not?
> A. Well, it was. That's what Funkhouser said.
> Q. And Ray Knight told you that too, did he not?
> A. Not all of it like that.

And later:

> Q. All right. Now, therefore, the person who had been creating the turmoil in the plant was not Mr. Funkhouser but, in fact, Mr. Knight, was it not?
> A. It could have been. I talked to Mr. Knight. . . .
> Q. It was, was it not? Yes or no?
> A. Yes.

2. The fatal "whatnot"

On August 22 when Bowen was leaving the plant at the end of the day, he was stopped by Stanley Haines, Rusk's assistant, who saw Bowen carrying a package. Haines discovered that it contained a "whatnot" in two pieces, one a large board about 2 feet long, and the other a piece of wood sawed in the shape of a cloverleaf, which had clearly broken off a "stem" cut in the other board. Haines took the items from Bowen and reported the matter to Rusk. Early the next morning, August 23, Rusk took Bowen's and Funkhouser's timecards to his office so that they would have to see him when they reported for work.

When the two men were in Rusk's office the morning of August 23, he asked them about the "whatnot." Funkhouser explained that the preceding afternoon at the end of a regular "break," he had returned to his machine and found this board (then in one piece) "laying on the table and part of the way it was sawed out,[8] and I finished sawing it out and set it down by the sander." Funkhouser further told Rusk that the next time he saw the "whatnot" was when Haines took it from Bowen. Bowen explained that he had found the broken "whatnot" on the floor and did not know who had sawed it.[9] At this point Rusk discharged both men for violating the rule against sawing out personal "whatnots" on company machinery. Prior to so doing, Rusk had discussed his intention to fire Funkhouser with Plant Manager Armstrong. Rusk testified that he did

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[8] Actually the board was about two-thirds sawed when Funkhouser picked it up, and in a matter of seconds finished the sawing.

[9] Rusk's and Bowen's testimony conflict as to whether Bowen admitted or denied drawing the pattern for the "whatnot" on the board. Funkhouser corroborated Bowen's testimony that Bowen denied marking the board. The conflict does not seem to me to be material to the issues before me, for even if Bowen denied drawing the pattern, Rusk may not have believed him. However, I credit Bowen's testimony that he denied drawing the pattern.

so because he was aware of Funkhouser's union activity and did not want "to cause any problems."

Rusk noted on Funkhouser's employment record as the reason for termination: "Did not do job as to instructions. Sawing whatnots on company time." He made no entry at that time under "Remarks" (where he had already noted some comments after the Knight episode), but some weeks later after talking with a "man from California"[10] Rusk added under "Remarks" that Funkhouser "seemed to fall apart efficiency and responsibility-wise." As to Bowen, Rusk noted as the reason for termination "making whatnots on company time," and added under "Remarks" the following: "This man was warned about making things to take home on company time but he still did it and was caught taking it out in a box."

3. Conclusions with respect to Funkhouser

General Counsel contends that with Funkhouser, as with Orndorff, the Company seized on a pretext to discharge him, and that Funkhouser's union activity was a substantial motivating factor in his discharge. Various factors tend to support that conclusion, and others to detract from it.

The "whatnot" episode itself appears somewhat trivial as far as Funkhouser was concerned. His sole offense was to complete the sawing of the wood, a matter of seconds rather than minutes. Even if Rusk disbelieved this part of the tale (and there is no testimony that he disbelieved it, and no apparent reason for him to have done so as Funkhouser apparently freely confessed his involvement),[11] the

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[10] The man is not otherwise identified, but I note that a California attorney signed the answer to the complaint in this case.

[11] Rusk apparently disbelieved Bowen's story that the wood was just in the trash when Bowen discovered it. But Rusk had some basis for suspecting Bowen, for Shelby Bishop had earlier named Bowen as asking her to stain "whatnots" for him.

sawing of the entire board would not have taken more than 1 to 2 minutes. Also it should be noted that Rusk seemed somewhat determined to involve Funkhouser in the matter if at all possible, for Rusk had pulled Funkhouser's time-card although no one at that time had connected him with the episode in any way, and he was by no means the only man operating the saws.[12]

Of greater significance, perhaps, is the effort by Rusk to build a case against Funkhouser starting the day after Funkhouser attended the representation case hearing. Rusk took what appears to be the unprecedented course of making an entry on Funkhouser's personnel record of criticisms of Funkhouser, although by Rusk's later admission the episode giving rise to the entry was the fault not of Funkhouser but of Knight, and the written entry dealt with matters not even involved in Knight's complaint.

In answer to these contentions, the Company points to the fact that it discharged Bowen and promoted Quick, although Bowen was believed to be antiunion and it knew Quick to be prounion. The Company also notes that by Funkhouser's own testimony, Rusk did discuss "whatnots" with him early in August (presumably, therefore, during the interview following the Knight episode), and—finally, the most important—that Rusk did not regard the "whatnot" situation as trivial and was determined to put an end to it.

If Funkhouser's case stood alone, I would incline to the view that General Counsel had established nothing more than suspicious circumstances, and would not have carried his burden of proof. Even though Funkhouser's participation in the "whatnot" episode was trivial, I would not think it lay in my mouth, or the Board's, to give the Company

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[12] Not only other men in the milling department but also employees in other departments repeatedly operated the saws, and their use by nonmill employees was not prohibited until after Funkhouser's discharge.

"gentle guidance by over-the-shoulder supervision." *N.L.R.B.* v. *I. A. McGahey, et al., d/b/a Columbus Marble Works,* 233 F.2d 406, 413 (C.A. 5). The difference between Funkhouser's case, if it stood alone, and Orndorff's is that the ground assigned in Funkhouser's case may seem unreasonable, but it is not totally unbelievable and contrary to all human experience, whereas the facts with respect to Orndorff show that the alleged ground attributes to the Company behavior so harsh as to be incredible, and at odds with its own practice.

But Funkhouser's case does not stand alone. Only a few days before the Company had discharged Orndorff, his friend, his neighbor, and associate in the Union, under circumstances which I have found establish that the Company was motivated by Orndorff's union activity. This circumstance when added to the others in Funkhouser's case tips the balance, and I find that his leadership of the Union was a motivating factor in the decision to discharge him.[13] Having found Funkhouser's discharge violative of Section 8(a)(3) and (1) of the Act, I deem it it unnecessary to pass upon the further allegation that the Company discriminated against him in violation of Section 8(a)(4) "because he filed charges or gave testimony under the Act," an apparent reference to his attending the representation hearing.

D. *Alleged Interference, Restraint, and Coercion*

The complaint alleges that Rusk on or about July 19 and August 26 violated Section 8(a)(1) of the Act "by

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[13] As to Quick, it suffices to note that the Company may well have had no pretext for treating him in any other fashion, and that failure to discriminate against some union members sheds little or no light on whether others were unlawfully treated. See *Nachman Corp.* v. *N.L.R.B.*, 337 F. 2d 421, 424 (C.A. 7); *N.L.R.B.* v. *W. C. Nabors d/b/a W. C. Nabors Company,* 195 F. 2d 272, 276 (C.A. 5), cert. denied 344 U.S. 865. As to Bowen, he had to be discharged to preserve even the semblance of a pretext for discharging the union leader, Funkhouser.

creating the impression of engaging in surveillance of meeting places, and activities of the Union . . . ." The evidence concerning these matters establishes the following:

(a) One afternoon in mid-July Orndorff stood outside the union hall talking to a girl for 15 to 20 minutes. The next morning Rusk asked him in a friendly manner why Orndorff had not been "in the union hall with the rest of the employees," and what he "was doing standing out front talking to a girl." Orndorff replied that he had been talking to a friend and had not been inside, whereupon Rusk laughed and said, "Maybe I shouldn't ask you that." The union hall is on the main road between the plant and downtown Winchester, and the driver of any car passing the hall could have seen Orndorff without turning into the hall. Rusk did convey to Orndorff that the Company knew its employees were attending a meeting at the union hall, and this episode occurred within 10 days after the first cards were signed. But if employees attend an afternoon meeting in a union hall situated on a main road, the Company's indication of its awareness thereof falls somewhat short of "creating the impression of surveillance."

(b) The second episode occurred about August 26 when Rusk came to two employees at work, Gladys Perry and Isabelle Kump, and asked them if their addresses were properly listed as the Union wanted a list. After the two employees had verified their addresses, Rusk asked them what "went on at the union meeting the night before," and then added, according to his own testimony, "I don't think Gladys was there, but I think you were there, Isabelle." Neither of the two women asked Rusk how he knew who had attended the meeting, and by the time of the hearing before me Perry had forgotten that Rusk knew she had not been there; she was of the mistaken impression that he had asked her if she had attended. At the time Kump replied to Rusk's inquiry by telling him that nothing in

particular had happened but that some pamphlets had been passed out, and she gave him one.

Rusk testified that in going through the plant checking addresses he learned of the meeting the night before, and "the people said this one was there and this one was, and [he] didn't hear [Perry's] name mentioned." But this explanation, even if true, does not answer the allegation in the complaint. As the Board stated in *Moore's Seafood Products, Inc.*, 152 NLRB 683-684:

> How this information reached [the employer] is not the criterion. The Board has held that whether or not an employer in fact spies upon the employees' union meetings, the creation of the impression in their minds that he is keeping their union activities under surveillance is as intimidating and as coercive as surveillance itself.[14]

Even allowing for Perry's failure to remember the episode clearly (and she recalled that he had known of Kump's presence before interrogating them), the record is clear that Rusk make Kump aware that he knew who had attended, and who had not attended, the union meeting. This is sufficient to sustain the allegation of "creating the impression of surveillance." *N.L.R.B.* v. *Prince Macaroni Manufacturing Co.*, 329 F.2d 803, 806 (C.A. 1).

Conclusions of Law

1. The Company by discharging Cather Orndorff and Dwight Funkhouser because of their union activities engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

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[14] *Moore* was enforced 63 LRRM 2353 (C.A. 7, Oct. 28, 1966), with express reservation of this point, footnote 2. Under the circumstances, it may be appropriate to note that I find the foregoing quotation fully and properly applicable here. Cf. *J. M. Machinery Corporation*, 155 NLRB 860, 865.

2. The Company by creating the impression of surveillance over union meetings engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

The Remedy

I shall recommend that the Company cease and desist from its unfair labor practices and from in any other manner infringing the rights of its employees under the Act. See *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4). Affirmatively, I shall recommend that the Company offer to reinstate Orndorff and Funkhouser with backpay computed in accordance with the formulas set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, and that it post appropriate notices.

I shall also recommend that the challenges to the ballots of Orndorff and Funkhouser be overruled, and that the Regional Director be directed to open and count their ballots and take such further action in the representation case as thereafter seems appropriate.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I therefore recommend, pursuant to Section 10(c) of the Act, issuance of the following:

Order

A. Respondent, Terry Industries of Virginia, Inc., Winchester, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee because of membership or activity in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, or any other labor organization.

(b) Creating the impression among its employees that it is keeping union meetings under surveillance.

(c) In any other manner interfering with, restraining, or coercing any employee in the exercise of his right to join or assist the above-named or any other labor organization.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to reinstate Cather Orndorff and Dwight Funkhouser, to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against them.

(b) Notify Cather Orndorff and Dwight Funkhouser if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(d) Post at its plant at Winchester, Virginia, copies of the attached notice marked "Appendix."[15] Copies of such

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[15] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

notice, to be furnished by the Regional Director for Region 5, shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[16]

B. The challenges to the ballots of Cather Orndorff and Dwight Funkhouser in Case 5-RC-5277 are hereby overruled, and that case is remanded to the Regional Director to open and count their ballots and to take further appropriate action therein.

Dated at Washington, D. C.

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[16] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 5, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

Notice to All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Offer Cather Orndorff and Dwight Funkhouser their former jobs and pay them for wages they lost since their discharges in August 1966.

All our employees have the right to join or assist International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, or any other union. They also have the right not to join or assist any union.

We Will Not take or threaten to take any action against them for engaging in union activity, create the impression that we are spying on union meetings, or in any other manner interfere with, restrain, or coerce them in their exercise of those rights.

Terry Industries of Virginia, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

Note: We will notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal

Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Sixth Floor, 707 North Calvert Street, Baltimore, Maryland, 21202, Telephone 752-8460, Extension 2100.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 991

TERRY INDUSTRIES OF VIRGINIA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-3a) is reported at 403 F. 2d 633. The Board's decision and order (Pet. App. 5a-28a) are reported at 164 NLRB No. 117.

JURISDICTION

The decree of the court of appeals (Pet. App. 4a) was issued on December 9, 1968. The petition for a

writ of certiorari was filed on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that the employer discharged two employees because of their union activity.

STATUTE INVOLVED

The revelant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set out at pp. 2-3 of the petition.

STATEMENT

Petitioner Company began the manufacture of camping trailers at Winchester, Virginia in February 1966 (J.A. 163; 76).[1] In July of that year, the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, began an organizing campaign. In August 1966, employees Orndorff and Funkhouser were discharged. A Board representation election was held on September 8, 1966 (J.A. 162-163; 20-22).[2]

The facts relating to the discharges are as follows:

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[1] "J.A." references are to the Joint Appendix in the court below.

[2] Of the ballots counted, an equal number were voted for and against the Union. The ballots of the two discharged employees were challenged, but will be counted if the Board's order is upheld.

1. Orndorff was active in the Union campaign. He solicited employees to sign authorization cards at the plant, and made his home available for a meeting of employees with a Union representative (J.A. 163, 167; 20-22, 36-37). On August 17, suffering from an infected jaw, Orndorff missed work (J.A. 163; 32). The next morning, still bothered by the jaw, he went to his dentist's office (J.A. 163; 32-33). At his request, the dentist's secretary called the plant to report that Orndorff was undergoing treatment and would be at work soon (J.A. 164; 32-33). When Orndorff reported to work a short time later, he learned that he had been discharged at 9 a.m. for violation of the Company's "24-hour" rule (J.A. 164; 33-35). That rule provided that an employee would be discharged if he failed to call the plant promptly on the second day of an absence (J.A. 164).[3]

The rule had not been applied mechanically in the past. One employee had not been discharged despite his failure to call in when absent three days in a row (J.A. 165; 105-109, 133); another was absent on Wednesday, Thursday and Friday, but was not discharged until he failed to report for work on the next Monday (J.A. 165; 115, 134). Three other employees were discharged on the third day of their absence (J.A. 165-166; 141, 143, 146, 150, 152-153, 157). Unlike Orndorff, who had been with the Company for six months, these last three had worked among them a total of eleven days (J.A. 165).

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[3] Orndorff had no telephone (J.A. 163; 111-112).

Production Manager Rusk placed a notation on Orndorff's employment record that, "Whenever this man is off he never calls in. He has been doing this since employment" (J.A. 166-167; 145). When asked to explain the notation, Rusk could recall only two prior occasions when Orndorff had been absent (J.A. 166; 98). On one of those occasions, he had sent timely word of his absence; on the other, his car had broken down on the way to work (J.A. 166; 40, 98-99).

2. Funkhouser was one of the Company's original employees, and had been promoted to the position of leadman in June because of his proficiency (J.A. 170; 8-9). He, too, was instrumental in starting the Union's organizational campaign; he solicited most of the authorization cards, and advised Union counsel at the Board's representation proceeding (J.A. 162; 2-3, 5-6, 20-22, 38). When he asked Production Manager Rusk for permission to attend the representation hearing, Rusk remarked, "So you're the one? Why don't the employees out here pick someone in the plant to represent them instead of the Union?" (J.A. 169, n. 6, 170; Tr. 45). Two days later, on August 11, Rusk told Funkhouser that another employee, Ray Knight, had complained that he was "popping off" around the plant (J.A. 171; 116), and wrote on Funkhouser's record (J.A. 171, 138):

> I have had this man in my office, talked to him about his job. He was told to stay in his own department but did not. He was told not to cut out anything for anybody other than company

work. He was told not to let anyone use the saws other than those assigned to them.

But at the Board's unfair labor practice hearing, Rusk admitted that, after talking to Funkhouser, he was satisfied of his innocence and convinced that Knight was responsible for creating the turmoil in the plant (J.A. 171; 117-119); and that the above notation actually referred to an incident which allegedly occurred a week earlier (J.A. 120-121). Rusk had learned that employee Bowen had asked another employee to stain some "whatnots" (small decorative items cut from wood for the employee's own use) and asked Funkhouser if he knew anything about the matter. When Funkhouser denied any knowledge of it, Rusk told him that no one was to cut out whatnots. (J.A. 171-172; 81, 119) Nothing was said to Bowen on that occasion (J.A. 119-120).

On August 22, Funkhouser found a board with a partially cut out pattern lying on his work table when he returned from a regular break; within a few seconds, he finished sawing out the pattern (J.A. 173; 15-17) The next morning, he was discharged.[4] Production Manager Rusk noted on Funkhouser's employment record, "Did not do job as to instructions, sawing whatnots on Company time" (J.A. 173; 83). Sometime after the discharge, at the suggestion of a "man from California," Rusk added to Funkhouser's record the comment, "Seemed to fall apart efficiency and responsibility wise" (J.A. 174; 84, 138).

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[4] The whatnot had been left at Funkhouser's desk by employee Bowen, who was also discharged (J.A. 173; 87-88).

3. On these facts, the Board found that the reason given for Orndorff's discharge was a false one,[5] and inferred from that fact, Orndorff's leading role in the Union campaign, and the other surrounding circumstances that he was really discharged because of his Union activity, in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 15a-23a). In the light of Rusk's effort to build a case against Funkhouser the day after he appeared at the Board representation hearing and the fact that he was discharged shortly after the unlawful discharge of Orndorff, his friend and Union associate, the Board also found that Funkhouser had been discharged for his union activity, in violation of the Act (Pet. App. 19a-21a, 23a). Finally, the Board found from other acts that the Company had created the impression of surveillance of the employees' union activities, thereby violating Section 8(a)(1) of the Act (Pet. App. 21a-23a). The Board ordered the Company to cease and desist from the unfair labor practices found, to offer Orndorff and Funkhouser reinstatement to their former or substantially equivalent positions, and to make them whole for lost wages (Pet. App. 24a-26a). The court of appeals sustained the Board's findings, and enforced its order (Pet. App. 1a-3a).

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[5] As the Board stated (Pet. App. 13a), "it would strain credulity to the breaking point to find that an employer discharged a man who had been undergoing medical treatment and who was 2 hours late in apprising the employer of this fact * * *."

ARGUMENT

The only question presented by the petition is whether substantial evidence supports the Board's finding that the Company discharged employees Orndorff and Funkhouser because of their union activities, in violation of Sections 8(a)(3) and (1) of the Act. The court of appeals found that the record adequately supported the Board's inference and findings; the issue does not warrant re-examination by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. The court's opinion considers the Company's principal defenses and shows that it reviewed the entire record, for it found "substantial evidence in the record as a whole to support the Board's findings" (Pet. App. 1a-2a). The court was not required to go to the extreme of discussing every piece of evidence petitioner relied on. In any event, the facts summarized above show that the Board was fully justified in concluding that the reasons advanced by the Company to explain the discharges were pretexts, and that the real reason for the terminations was the employees' union activities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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